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Office Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. [redacted]B 39

GULF, MOBILE AND NORTHERN RAILROAD COMPANY, PETITIONER,

vs.

W. F. WELLS.

BRIEF FOR PETITIONER

ELLIS B. COOPER,
Counsel for Petitioner.

[illegible] DISCUS, JACKSON, TENN

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STATEMENT OF CASE

W. F. Wells, respondent, filed this suit against the Gulf, Mobile and Northern Railroad Company, petitioner, in the Circuit Court of Jones County, Mississippi. The declaration alleged a personal injury to respondent while employed as, and performing the duties of, a brakeman on a freight train.

The declaration is in three counts. Each count alleges that petitioner owns and operates a line of railroad as a carrier of freight and passengers from Mobile, Alabama, through Mississippi into Tennessee. In each count it is alleged that respondent was employed as a brakeman on a freight train and while so employed on June 2, 1924, he suffered a sprained ankle and broken knee cap.

The first count alleges that petitioner owed respondent the duty to furnish him a reasonably safe place in which to work; that petitioner failed in this duty and permitted a piece of coal to be on or near the track; and that respondent stepped upon the coal in attempting to board the train, stumbled, fell, and sustained the injuries for which suit is brought. (R., p. 2).

At the close of respondent's case, the trial court on motion directed a verdict on this count and it is of no concern to this court. (R., p. 41.)

The third count bases liability on the operation of the train within a municipality at a greater rate of speed than six miles per hour. (R., p. 4.) At the close of respondent's case, the trial court directed a verdict for petitioner on this count and it is of no concern here. (R., p. 42.)

The second count presents the act of negligence upon which the case went to the jury. The negligence charged is in these words:

> "——— the plaintiff undertook to get on the said freight train at a time when the train was moving, as it was his duty to do, and as he caught hold of the hand iron on the said train and started to get on the said train he stumbled on a piece of coal which was negligently left on the yard; and just at the time he stumbled the engineer on said train gave a very sudden and very unnecessary jerk of said train, and carelessly and negligently jerked him from said train and caused him to fall to the ground, causing him to suffer serious and permanent injury, which is more fully set out herein." (R., p. 3.)

Petitioner filed several pleas including the general issue with notice thereunder that evidence would be offered to show that petitioner and respondent at the time of the injury were engaged in commerce between the states. (R., p. 6.) The other pleas are of no concern here.

The facts disclose that respondent was engaged in the performance of his duties as brakeman on a freight train of petitioner. That the train was an instrument of interstate commerce is without dispute inasmuch as one of the cars of the train originated at Philadelphia, Mississippi, destined to Holliday, Texas. (R., pp. 47, 49.)

When the station of Stratton, Mississippi, was reached certain switching was done and respondent assisted. After the work was done at Stratton, respondent was on the left hand side of the train at or near the caboose. This is the side on which is the seat of the fireman in the cab of the locomotive. Respondent "high-balled" the fireman, meaning thereby that he was ready for departure. The fireman received respondent's "high-ball" signal and left his seat.

Just after the "high-ball" signal, the conductor directed respondent to throw a derail on an adjoining track. The train was set in motion and had traveled about 50 feet when respondent returned to catch it. As he did so he sustained the injury complained of due to an unusual lurch or jerk of the engine. The extent of the injury was seriously contested. Petitioner's evidence was in the nature of x-ray photographs and their interpretation by experts. This was excluded because of a statute of Mississippi which provides that all communications between physician

and patient shall be privileged. (R., pp. 55 to 63, inc.)

Petitioner's evidence is that the lurch or jerk was occasioned by slack, if there was such a lurch or jerk. The crew of the engine swear that they did nothing to cause a jerk or lurch. It further appears that the engineer could not cause a jerk or lurch while the train was moving and that slack is a condition found in all trains of standard construction and in good condition.

A detailed statement of the facts is necessary to the presentation of the first specification of error.

There was a verdict for respondent and an appeal to the Supreme Court of Mississippi where the judgment was affirmed without an opinion. (R., p. 73.) Suggestion of error was filed and overruled. (R., p. 79.)

At the close of the evidence petitioner requested the court to direct a verdict for petitioner. This was refused. (R., p. 14.) And petitioner requested two other instructions pertinent to the issues which were refused. (R., p. 14.)

Specification of Errors.

1. There was error in refusing to grant petitioner the following instruction:

> "The court instructs the jury to find for defendant." (R., p. 14.)

2. There was error in refusing to grant petitioner the following instruction:

> "The court instructs the jury for the defendant that if you believe from the evidence that the crew

of the engine did not know that the plaintiff was not aboard the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train." (R., p. 14.)

3. There was error in refusing to grant petitioner the following instruction:

"The court instructs the jury that even though you may believe from the evidence that there was an unusual lurch, still if said lurch was occasioned by the slack between cars running in or out, it is your sworn duty to find for defendant." (R., p. 14.)

Brief of the Argument.

1. Under the Federal Employers Liability Act negligence must be proven. Railroad Co. *v.* Horton, 233 U. S. 492; 57 L. Ed. 1062; Railroad Co. *v.* Wagner, 241 U. S. 476; 60 L. Ed. 1110.

2. Where the declaration charges "that the engineer gave a sudden and unnecessary lurch of the train" which caused the injury for which the suit is brought, this is not supported by the evidence when the only testimony as to any lurch is that of the plaintiff who swears "the engine gave an unusual jerk." (R., p. 21.) And particularly is this true where the injured party was not looking at the locomotive and the testimony of the engineer and fireman is to the effect that nothing was done to cause a jerk or lurch, and if there was such jerk or lurch it was due to slack. (R., pp. 62, 64, 67 and 68.)

3. In such a case where the evidence shows that such jerk may have been caused by slack running in or by the engineer, the negligence is not proven when the engineer shows that he did nothing to cause it. The possible inference that the engineer caused the jerk is destroyed. Southern Ry. Co. *v.* Dickson, 211 Ala. 481; 100 So. 667.

4. Where the evidence for a plaintiff, in an action charging an engineer with a negligent jerk, is that his injury was caused by a jerk not unusual for men on the train but unusual for plaintiff on the ground and about to board the train, it is necessary to prove that the engineer knew, or had reason to believe, that

plaintiff was on the ground and about to board the train. Southern Railway Co. *v.* Dickson, 211 Ala. 481, 100 So. 667; Austin *v.* Mobile & Ohio Railroad Company, 134 Miss. 226; 19 So. 3; Davis *v.* Shirer, 288 Fed. 293.

5. In such case the knowledge that is material is that of the engineer, or, to say the least, of the engine crew, and not of the entire crew of the train. Refusal of instruction to that effect is error. Railway Co. *v.* Dickson, 211 Ala. 481, 100 So. 667; Austin *v.* Railroad Co., 134 Miss. 226, 99 So. 3; Davis *v.* Shirer, 288 Fed. 293.

6. It is error to refuse to instruct the jury to find for a defendant if the running in or out of the slack caused the injury, where it appears without dispute that slack is found in all trains of standard construction and the running in or out is a necessary incident to the operation of such train.

ARGUMENT.

The Court Erred in Refusing to Direct a Verdict for Petitioner.

At the close of respondent's case, the trial court on motion of petitioner excluded the evidence as to the first and third counts and instructed the jury as to these counts to find for petitioner. (R., pp. 41 and 42.) This left for consideration the second count. Petitioner offered its evidence as to this count alone. At the close of the whole case petitioner requested an instruction, as shown on page 14 of Record, in the following form:

> "The court instructs the jury to find for defendant."

This instruction was refused. (R., p. 14.) This action of the court is the basis of the first specification of error. The request for this instruction under Mississippi practice presents the question as to the sufficiency of the evidence to support the cause of action alleged. Swan v. Liverpool Ins. Co., 86 So. 460, 123 Miss. 826.

As shown above petitioner insisted, and now insists, that the evidence does not show any negligence on the part of petitioner. That this is essential in all suits based on, or brought under, the Federal Employers Liability Act is borne out by many cases from this court, including Seaboard Air Line Railway Co. v. Horton, 233 U. S. 492, 58 L. Ed. 1062, and San Antonio Ry. Co. v. Wagner, 241 U. S. 476, 60 L. Ed. 1110.

The act of negligence alleged was "that the engineer gave a sudden and unnecesary lurch of the train." Petitioner respectfully submits that its contention that no negligence is shown finds ample support in two propositions, viz:

1. The declaration charges that the engineer caused the train to jerk unnecessarily and suddenly. This is not supported by the record.

2. The testimony of respondent was that the jerk was unusual only for men on the ground who were about to board the train. It is submitted that under such circumstances no negligence is shown unless it is made to appear that the engineer knew, or had reason to believe, that respondent was not on the train but was about to board it.

1.

No Evidence That Engineer Caused the Jerk.

Respondent swears that after he had given to the fireman a signal to go ahead the conductor told him to throw the derail on an adjoining track. The derail was about forty feet from the back end of the train. After throwing the derail respondent says:

> "I throwed this derail and cut straight across to get to the caboose—the train was running not over eight or ten miles per hour when I went to catch the caboose and this big lump of coal about as big as your fist was there and as I grabbed the grab iron I stepped on this piece of coal and I went down and the engine gave an unusual jerk and that threw me and my knee struck on the cross ties." (R., p. 21.)

The train consisted of eight, nine or ten cars. The caboose was the last car of the train. Respondent was on the left hand side of the train. He had signaled

the train to go ahead. (R., p. 29.) Respondent was experienced in boarding moving trains and knew that was one of his duties. (R., p. 30.) The train had moved about fifty feet between respondent's signal to go ahead and his attempt to board. (R., p. 29.)

Respondent swears that as he reached to catch the train he had his eyes and mind on getting on that train and in watching the way he was going. (R., p. 36.)

This places respondent by his own evidence from eight to ten cars away from the locomotive. He was approaching it, as is evident, at a right angle and with his eye on what he was doing. The track was perfectly straight. (R., p. 39.) Had the jerk occurred as respondent approached the train he could not have observed the locomotive because he was not looking at it. Surely he could not say the locomotive caused the jerk when the jerk occurred after he had stumbled while at the very side of the train with the locomotive on a straight track ten cars away

Respondent swears, too, that slack running in does to a certain extent cause the train to jerk and lurch. (R., p. 37.)

This is in substance the testimony of respondent in support of the charge that the engineer gave a sudden and unnecessary jerk of the train. The most that can be said is that there is from respondent's statement an uncertain inference that the engineer caused the jerk. He could not know that the engine did it.

All of the crew in a position to know say that the engineer did nothing to cause a lurch or jerk. Alexander, the engineer, swears that he "started off in the ordinary way,—open throttle" and did nothing to

cause a sudden or unusual lurch. (R., p. 62.) And on cross examination when asked what causes the train to lurch said that "slack" caused it. And further he swears that the engineer can not make a train lurch when the slack is all out or when the train is in motion. (R., p. 63.)

Blalock, the fireman, swears that nothing was done on the locomotive to cause it to lurch or jerk. (R., p. 64.) And he swears that "slack" alone causes a lurch in a moving train. (R., p. 65.)

Ezell, the head brakeman, was on the locomotive with the engineer and fireman. He says nothing was done on the locomotive to cause the jerk or lurch. (R., p. 68.)

The flagman who was on the caboose does not remember that there was any lurch. (R., p. 69.) In fact the flagman was sweeping out the caboose and he was not thrown. The conductor who was on the caboose felt no unusual, or even usual, jerk. (R., p. 49.)

As to "slack" the conductor swears as follows, putting his testimony as shown on pages 49 and 50 of the Record in narrative form:

> "The lurch and jerk about any freight train is caused by the slack running in and out. The lurch or jerk when a train starts is due to slack. The drawhead is the coupling. All the drawheads have springs and slack will run in and when you pull out it will straighten out. On each end of a car is a coupling. The spring is behind the drawhead and under the car. When the cars are bunched the springs press together. When the train starts out it naturally stretches out; pulling the drawheads away will pull the slack out. There is

> no way to prevent this. The train was properly equipped with brakes, and couplings and drawheads and according to the standard and best known methods in reference to drawheads."

This is the state of the case. The respondent did not attempt to deny the facts testified to by the train crew as to the effect of slack and as to the inability of the engineer to cause a jerk or lurch while the train was in motion. There is no contradiction or impeachment of their testimony.

Petitioner respectfully submits that this evidence utterly fails to show negligence on the part of the engineer or any other member of the crew.

Concede for the argument that there was a jerk. Still the record shows without dispute that the engineer did not cause it. All witnesses agree that "slack" could have caused it. All agree that "slack" is in all trains of standard construction. The jerk, if any, must have been caused by the "slack."

To say the most for respondent's case, two causes of the jerk appear. One was, to use respondent's language, "the engine gave an unusual jerk." The other was the operation of slack in the train. But respondent's statement that the engine gave an unusual jerk does not prove that the engineer caused it. This might have happened without any act of the engineer. Slack running in would necessarily affect the locomotive. So the jerk was due to one of two causes. As to which, the evidence of respondent says little. But the evidence is undisputed that the engineer could not have caused it. The Supreme Court of Alabama in the case of Southern Railway Co. vs. Dickson, 211 Ala. 481, 100

So. 667, a case based upon the Federal Employers' Liability Act, said:

> "Counsel's insistence is that, conceding the fact of the jerk or jar, the evidence shows that it might have been the result of any one of four distinct agencies: (1) The jamming of the air; (2) the sticking of the brakes; (3) the rolling up of the slack (there being 49 cars) or (4) the act of the engineer, and that, as to any causative action by the engineer, the affirmative conclusion required could not be grounded on anything more than conjecture. As this court has often declared, findings of fact based on conjecture merely cannot be upheld. As said in Southworth, Adm'x *vs.* Shay:
>
> > "'Proof which goes no further than to show an injury could have occurred in an alleged way does not warrant the conclusion that it did so occur, where from the same proof the injury can with equal probability be attributed to some other cause.'
>
> "But a nice discrimination must be exercised in the application of this principle. As a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference. There may be two or more plausible explanations as to how an event happened or what produced it; yet, if the evidence is without selective application to any one of them, they remain conjectures only. On the other hand, if there is evidence which points to any one theory of causation, indicating a logical sequence of cause and effect, then there is a judicial basis for such a determination, notwithstanding the existence of other plausible evidence."

In the instant case the jerk may have been due to (1) the rolling up of the slack or (2) the act of the engineer. No other cause is hinted at. Respondent's

testimony is that the "engine gave an unusual jerk." He does not say the engineer caused it to give this unusual jerk. His testimony does not select a cause. Petitioner's evidence shows clearly that the engineer did not cause it and could not cause it. It shows that "slack" could cause it.

Petitioner respectfully submits, therefore, that the evidence does not establish that the engineer caused the jerk and, since this was the negligence alleged, the peremptory instruction should have been granted.

2.

Conceding for the Argument that Engineer Caused Jerk, Still No Negligence is Shown.

Respondent swears that the jerk was unusual. He does not say that it was violent or that it was unnecessary. The statement that it was an unusual jerk was necessarily relative. On being pressed to give an idea as to how unusual the jerk was, respondent said:

> "Q. You did not say on the former trial that the lurch you said the train gave or the jerk was not such a jerk as is frequently had on trains when the men are on the ground—did you say that or not?
>
> A. I don't remember. I remember telling you if the engineer had reversed his air brakes in control the slack was in the train would roll itself.
>
> Q. Did you say it was the usual jerk for men who were on board?
>
> A. I said it was the usual jerk.
>
> Q. Did you on the other trial?
>
> A. Yes.

Q. What you said on the other trial was true,
A. As far as I understand." (R., p. 39.)

The jerk, therefore, was the usual jerk for men on board but unusual for men on the ground about to board. All consideration is omitted of the fact that the flagman while sweeping out the caboose was not thrown by the jerk.

Petitioner submits, conceding for argument's sake that the engineer caused the jerk, that if the jerk was "unusual" only for a man about to board the train, that the engineer was not negligent unless he knew, or had reason to believe, that respondent was on the ground. In other words, the jerk was not in itself negligent. It was negligent only as to a person in a particular situation.

The Supreme Court of Alabama in the case of Southern Railway Co. *vs.* Dickson, *supra*, was confronted with a case of a violent, unusual and extraordinary jerk. It here said:

> "Our cases very clearly support the proposition that, when the act which caused the injury is specified, and is not negligent in itself, but only when the actor was chargeable with knowledge that some one was in a position of peril with respect to consequences, no breach of duty is shown without an allegation that the actor had such knowledge or was so chargeable."

And the Supreme Court of Mississippi in the case of Austin *v.* Mobile and Ohio Railway Company, 134 Miss. 226, 99 So. 3, said:

> "Engineer on engine pushing six flat cars, who without signal applied emergency brakes, and brought the train to a sudden stop on signal from

conductor, when a cow made an effort to cross in front of the train, and who thereby caused a switchman riding on the front end of the front car to be precipitated over the end of the car held not negligent in the absence of evidence that he knew that the switchman was in a position of peril, or that he should or could have given a signal."

And the Circuit Court of Appeals for the Fourth Circuit in the case of Davis *vs.* Shirer, 288 Fed. 293, dealt with a case in principle similar to the case at bar. That court said:

"There remains the allegation that there was negligence in so managing the train as to cause the unusual jar. To whatever degree it was out of the common, it does not appear to have been sufficiently great to injure any of the passengers in the car. Several of the witnesses who have testified apparently were on their feet at the time it occurred, and only one complained of having lost his balance in consequence. Had the engineer any reason to anticipate that the deceased would be trying to get upon one of the cars at the time, and was he in consequence bound so to operate his train as to avoid the risk of jarring it at the moment that the decedent might be trying to get on it? It would seem that the engineer had the right to assume that the decedent was where the rule and the safety of everybody on his train required him to be, and that was somewhere not less than half a mile in the rear of his train or on his way to that point. It has been argued that the defendant may not rely upon the violation by the deceased of this rule, because it was said it was not pleaded, and, even if it has been, this defense goes only to question of contributory negligence which does not bar the recovery. Neither contention is sound. Before any question of contributory negligence can become important, and before

the defendant is called upon to make or allege any affirmative defense, the plaintiff must show that he was negligent in some manner of which the deceased had the right to complain. This, in our view, she has failed to do.

"Railroading is a dangerous occupation. A certain number of accidents will happen without the companies having fallen short of the highest care reasonably practicable."

Did the engineer know, or have reason to believe, that respondent was on the ground and about to board the train? The undisputed facts on this feature are these:

Respondent was on the fireman's side. He signaled the fireman that he was ready to go. (R., p. 29.) The fireman says he "highballed" Mr. Wells and he highballed him back. The fireman then left his seat, got down on the deck of the locomotive, and began firing. (R., p. 64.) The engineer swears that he did not know where Wells was when he pulled out. (R., p. 62.)

Respondent, standing as he was, by the caboose, gave the signal to move. The alleged jerk was given after the train had moved forward 50 feet. Clearly the engineer did not know respondent was not on board. And there can certainly be no basis for charging that he had reason to know that he was about to board. Respondent's signal was to the fireman the assurance that he was ready to go.

The Alabama court in the case of Railway Co. *v.* Dickson, *supra*, thus announces the essentials of liability in a case of jerks and jars as in the case at bar:

> "In order to recover in this case it was necessary for plaintiff to show: (1) That he was thrown from his position on top of the car by a jerk or jar; (2) that this jerk or jar was sudden, extraordinary, and of unusual violence; (3) that it was caused by the engineer in the operation of the train; (4) that it was not a necessary incident of such operation, and (5) that at the time of its causation the engineer knew, or had reasonable grounds for believing, that the plaintiff then occupied such a position on one of the cars that such movement would probably imperil his safety."

Applying these principles to the case in hand we have:

(1) The evidence shows that respondent was jerked off. At least it was a question of fact. (2) The jerk was not characterized as "sudden or extraordinary" nor was it characterized as of "unusual violence." It was characterized as an unusual jerk. (3) The engineer swears positively that he did not cause the jerk. No one says he did. (4) The jerk, according to the evidence, was due to "slack" which is an incident to train operation and present in all such operations. (5) The engineer did not cause it. Even had he, the engineer did not know, nor had he reasonable grounds for believing that respondent was in a position that such a movement would imperil his life or limb.

Petitioner respectfully submits that under the facts no negligence was shown and certainly the negligence charged was not proven. And the trial court erred in refusing to direct a verdict for petitioner and the Supreme Court of Mississippi erred in affirming that action of the court.

Refusal of Instruction that if Crew of Engine Did Not Know Respondent was Not Aboard to Find for Petitioner.

Petitioner requested of the trial court the following instruction which was refused:

> "The court instructs the jury for the defendant that if you believe from the evidence that the crew of the engine did not know that the plaintiff was not aboard the train, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train." (R., p. 14.)

In lieu thereof the court granted the following instruction:

> "The court instructs the jury for the defendant that if you believe from the evidence that the crew of the train did not know that the plaintiff was not aboard the train, and was guilty of no negligence in not knowing, it is your sworn duty to find for the defendant, even though you may believe that an unusual lurch was given the train." (R., p. 12.)

It might be well to state here that under the law of Mississippi the trial court may not instruct the jury except through written instructions prepared and presented to the court for the purpose of being granted or refused, Mississippi Code of 1906, Sec. 793, Hemingway's Code, Sec. 577. It is reversible error for the court to instruct the jury orally even on the inquiry of the jury. Gilbert *v.* State, 78 Miss. 300, 29 So. 477. The trial court may not originate an instruction but is confined to the written requests of the parties. Canter-

berry *v.* State, 90 Miss. 279, 43 So. 678. As far as the trial court may go in presenting to the jury his idea of the law is through the requested instructions or by a modification thereof. And the court is under no duty to modify. And the modification must be in writing. Johnson *v.* State, 78 Miss. 627, 29 So. 515.

So the instructions shown to have been given for respondent on pages 10 and 11 of the Record reflect all instructions given for respondent. The instructions shown on pages 12 and 13 reflect all the law given to the jury for petitioner. And the refused instructions shown on pages 13 and 14 of the Record show all requests that were refused.

As will be observed the court refused to instruct the jury that if the crew of the engine did not know that plaintiff was not aboard the train that it should find for petitioner even though it may have believed that an unusual lurch was given the train.

This is but a statement of the law which petitioner says entitled it to a directed verdict. The evidence in detail has been pointed out.

Respondent says the lurch was "unusual" but only for men not on board the train who were about to get on it. Assuming that the engineer caused the lurch, it is not disputed that respondent set the train in motion or had a hand in it. And he did this while close to the train. The jerk was negligent only when it is made to appear that knowledge of the position of peril of respondent was with the engineer. Railway Co. *v.* Dickson, *supra*, Austin *v.* Railroad Company, *supra*.

The knowledge of the engineer or those on the locomotive is essential. The engineer was the negligent actor, if the pleadings are consulted.

But the court declines this instruction. It does, however, concede that under the facts of this case knowledge of the perilous position is necessary. This is clearly shown for the court did instruct the jury that if "the crew of the train did not know that plaintiff was not aboard the train, and was guilty of no negligence in not knowing" then the jury should find for petitioner even though there may have been an unusual lurch.

Petitioner submits that it is not the knowledge of the entire crew that is material but the knowledge of the engineer or to say the least of those in the locomotive, the engineer and fireman.

This departure in the instruction was hurtful because the conductor admits he sent respondent to throw the derail. (R., p. 52.) But the court did not stop with the qualification that the train crew must know. It added the qualifying clause "and was guilty of no negligence in not knowing." There is nothing in the record to support this qualification. The conductor says that it was the duty of each man to look out for himself. (R., p. 52.) And respondent on being asked who gave the signal for the train to go ahead said: "I did." (R., p. 29.)

Petitioner respectfully submits that the refusal to give the instruction as requested was error.

Refusal to Charge Jury that if Slack Caused Lurch to Find for Petitioner.

Petitioner requested the trial court to instruct the jury that if the lurch was unusual and was occasioned by the slack of the cars running in or out, it was the duty of the jury to find for the petitioner. (R., p. 14.)

There is no dispute that slack is in all trains of standard construction in good condition. The running in and out of the slack is an incident to the operation of the train. And it causes jerks and lurches. There is no dispute on the record as to this. (R., pp. 37, 49, 50.) Clearly a thing naturally incident to the operation of a train of standard construction is not negligence.

Petitioner respectfully submits that for the foregoing reasons this cause should be reversed.

Respectfully submitted,

ELLIS B. COOPER,
Attorney for Petitioner.